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Constitutional Law

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Bill of Rights

The defendant in *State v. Pearson*[1] had been on trial, charged, as a second offender, with operating a motor vehicle while under the influence of intoxicants. The question in the case involves the admissibility of the magistrate's report, made pursuant to statutory directive, to establish the defendant's prior conviction for drunken driving. Several questions were disposed of by the Court. It upheld the report as a public document and admissible as such. In this connection, it pointed out that the admissibility of public documents in evidence was an exception to the Hearsay Rule. To reach this result, it first denied that the magistrate's trial docket was the "best evidence" of the prior conviction. Apparently only these two questions had been raised in the Court below, but on appeal, the defendant contended that he had been deprived of his constitutional right to be confronted with the witnesses against him.[2]

While the Court noted that the constitutional question was not properly before them, they undertook to dispose of it in any event. The Court held that the provisions of the Bill of Rights guaranteeing the right of the accused in all criminal prosecutions to be confronted with the accusers and witnesses had never been extended to the point where it permitted the exclusion of proper documentary evidence. Accordingly, the Court held that that portion of the record relating to the former conviction or guilty plea of the defendant was admissible. However, the Court refused to pass upon the question as to whether other facts set forth in the record (such as the identity of the person of the defendant) was admissible. Thus does the Court seem to invite further litigation on this question. One wonders why one portion of the document might

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1. 223 S.C. 377, 76 S.E. 2d 151 (1953).
2. U. S. CONST. AMEND. VI; S. C. CONST. ART. I, § 18.

be admissible and another part inadmissible, since the admissibility of the document in evidence does not prevent the introduction of evidence to challenge its correctness as to any particular. Perhaps in some later case, when the identity of the person convicted of drunken driving is at issue, the question suggested by the Court will be raised and disposed of.

For the second time during the past year our Court had occasion to consider the effect of the provision in the Bill of Rights[3] guaranteeing, to one accused of crime, the right to be confronted with the witnesses against him. In *State v. Corn*,[4] the question was raised by a convicted defendant who sought a new trial on the ground of after-discovered evidence. Specifically, the question was raised when the State offered affidavits countering those offered by the appealing defendant. The Court noted that the constitutional provision did not apply to motions for new trials. To sustain this holding, the Court quoted at length from both State and U. S. Supreme Court decisions.

State v. Floyd[5] is another of a rather large number of cases decided in the past year in which convicted defendants asserted that they had been deprived of rights guaranteed to them by the Bill of Rights.[6] No important declaration of principle is to be found in this case, but it does involve an interesting application of the principle that a confession, to be admissible, must be voluntarily made. In this case, the Court found upon the record that it was exceedingly doubtful whether the confession had in fact been voluntarily made, and unhesitatingly set aside the conviction. On the basis of the facts as they are set forth in the opinion, we have no quarrel with the Court's holding. The opinion reads:

> Here we have a boy 17 years old, charged with a crime, the punishment for which could be death by electrocution, being questioned by armed officers of the law, but in the main by one particular officer who finally typed a statement which he prepared for the appellant's signature, at intervals from 6:30 A.M. to 1:30 P.M., and who was at least called a liar several times by the officer, and with this officer cursing, talking in a loud voice, and slapping his hands together in an excitable manner soon after the

3. See note 2.
4. 224 S.C. 74, 77 S.E. 2d 354 (1953).
5. 223 S.C. 413, 76 S.E. 2d 291 (1953).
6. U. S. CONST. AMEND. I to X inclusive.

appellant was arrested, and without the appellant having had the opportunity of conferring with a friend or any members of his family. In the space of time indicated hereinabove a most damaging statement is signed, and one contrary to the testimony of the appellant upon his trial.

Upon a careful analysis of the testimony in reference to the procurement of this confession, we cannot erase from our minds the probability that this boy was overawed by the treatment he received at Olanta by Officer Hobbs, and by being surrounded by armed officers in Sumter, and therefore signed what he knew would satisfy Hobbs. The Trial Judge had no precedent of a decided case of closely similar facts to govern him, and had to make a 'snap judgment' decision, whereas we have been able to give the issue mature thought; and upon doing so, we have reached the conclusion that this alleged confession was so tainted, it should have been excluded.

Purpose for Which Public Funds May Be Used

The case, *Caldwell v. McMillan*,[7] is a general attack upon the validity of the legislation authorizing, and the subsequent actions of the State Highway Department in constructing and operating a cafeteria in the new State Highway Department Building in Columbia, which is designed to serve employees and officials of the State. It is, of course, an important principle of constitutional law that State expenditures must be for public purposes. The great majority of cases where this question is raised are those relating to the issuance of bonds. Here, however, is one of the infrequent cases where a taxpayer concerns himself with a legislative enactment in an adversary proceeding rather than in the usual test case. His principal challenge to the act is that the purpose of the expenditure authorized is not for a public purpose. The Court finds little difficulty in disposing of this contention, noting that many things are now considered to be of public concern which were in former days considered to lie altogether in the realm of private concern. In reaching that result, the Court also noted that the question as to whether the purpose of an act is public or private is primarily one for determination by the legislative body, although there does lie in the Courts, the power of review. That principle, however, is very clearly written into the law of South Carolina.

7. 224 S.C. 150, 77 S.E. 2d 798 (1953).

Limitations on State's Debt

In an earlier edition of this Law Review,[8] the writer discussed constitutional limitations on public finance and reviewed at some length the so-called South Carolina Special Fund Doctrine. Since the date of that review, two important and interesting decisions have been handed down, one of which is the subject case, *Arthur v. Byrnes*.[9]

To finance its huge program of public school buildings, the 1951 Legislature levied a three percent sales tax and set up the proceeds of this tax as the special fund to secure an authorized $82,500,000 of general obligation bonds of the State. The usual test suit followed[10] to determine the validity of the tax, the sufficiency of the special fund, and of the bonds themselves. For the first time in any special fund case, it was contended that the question of whether any particular fund was sufficient to bring it within the purview of the Special Fund Doctrine was a judicial question and not one which might be resolved by the legislative or executive branches of the government. The Court agreed that the determination of the sufficiency of any special fund was "in the nature of a judicial function." But it held that it might properly be delegated to executive and administrative officers under the Constitution "subject to Court review and reversal in proper cases." The Court noted that if such were not true, then the "thou shalt not" of a Constitution could be brushed aside by the simple *ipse dixit* of the servants thus bound and the mandate of the Constitution would thus be rendered impotent. The importance of this conclusion is of great significance, for it makes Court review an essential part of the proceedings in the issuance of special fund bonds.

The subject case is an instance where the Court accepts the burdens imposed upon it and actually exercises its power of review. The Legislature had authorized general obligation bonds of the State, payable primarily from a special fund derived from the tuition fees charged at each of the several institutions of higher learning in the State. It had required that:

> . . . the 'schedule of tuition fees, as applied to the regularly enrolled students at such State Institution, on the

8. 3 S.C.L.Q. 303 (1951).
9. 224 S.C. 51, 77 S.E. 2d 311 (1953).
10. State *ex rel.* Roddey v. Byrnes, 219 S.C. 485, 66 S.E. 2d 33 (1951).

> basis of the number of students regularly enrolled at such State Institution at the close of the last preceding academic semester or term (exclusive of any summer school semester or term), will, if multiplied by the number of years for which the bonds herein provided for shall be outstanding, result in the production of a sum equal to not less than one hundred ten per cent of the estimated aggregate principal and interest requirements of all State Institutional Bonds issued for such State Institution to be outstanding if such application be approved.'

The State Budget and Control Board had decided that the 110 per cent coverage provided in the Act was insufficient and had adopted a resolution requiring 125 per cent coverage, but even this did not appeal to the Court which, exercising a very wise discretion, concluded that the special fund would not be sufficient unless 150 per cent coverage existed. It so ruled.

We shall not extend this discussion with a further review of our Special Fund Doctrine except to say that the result which has come about, which makes a judicial branch a necessary participant in proceedings to issue special fund bonds, was inevitable. The writer seriously doubts if the Court, as presently constituted, would have ever adopted the Special Fund Doctrine. Nevertheless, it feels that it is bound to follow that doctrine because of *stare decisis*.

Special Acts Relating to Venue

In the case, *Fordham v. Fordham*,[11] the court correctly diagnosed a provision in the Act,[12] relating to the Domestic Relations Court for Charleston, which permitted that Court to assume jurisdiction over a non-resident (of the County) defaulting father and husband, found by chance in Charleston County, as a special law where a general law was applicable, and thus invalid as violative of Subdivision 9 of Section 34 of Article III of the State Constitution.

Following a family quarrel, at their home in Berkeley County, the plaintiff, mother and wife, moved to Charleston County with her children. Thereupon, she instituted this action for support in the Domestic Relations Court for Charleston County, and secured service upon the defendant while he was in Charleston on a casual visit. His attempts to resist the juris-

11. 223 S.C. 401, 76 S.E. 2d 299 (1953).
12. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 15-1233 (2).

diction of the Domestic Relations Court were unsuccessful in that Court and in the Court of Common Pleas, but on appeal to the Supreme Court, the lower courts were reversed and the Supreme Court held that the venue provision was invalid as a special law, where a general law on that subject existed.

Once again the Supreme Court noted that the right of an individual to be sued in the County of his residence was a valuable right. It also observed, pointedly, that if the lower court's holdings were correct, a defendant could be sued in any number of counties.

When one recalls that inferior courts, such as the Domestic Relations Court of Charleston County, may be established by special enactments,[13] the importance of this holding becomes clear.

Delegation of Legislative Power

In *State v. Taylor*,[14] a twofold attack was made upon the constitutionality of the 1950 Act[15] regulating public livestock markets:

> It requires any person operating a public livestock market in South Carolina to obtain a permit from the State Veterinarian. Upon the filing of an application for such permit and the giving of the required bond, 'the technical livestock committee, composed of four men appointed by the Board of Trustees of Clemson Agricultural College and the president, vice-president and secretary of the Livestock Dealers Association shall make an official inspection of the premises of each applicant, and if in their opinion the owner or owners of the proposed market can comply with the provisions of this Act, the State Veterinarian shall issue the permit.'[16]

The Court construed the defendant's vague first exception to the validity of the Act as a challenge that the Legislature could not lawfully confer, on the Board of Trustees of Clemson College, the power of appointment, and that the livestock dealers association, whose officers were members of the committee, is a private business organization, without any official or governmental status. In its earlier decision, *Ashmore v.*

13. S. C. CONST. Art. V, § 1.
14. 233 S.C. 526, 77 S.E. 2d 195 (1953).
15. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 6-331-6-347.
16. See note 14.

Greater Greenville Sewer District,[17] the Court had held that the power of appointment to public office might not be delegated to unofficial persons or bodies, where the latter were not rationally and substantially related to the law to be administered by the appointees. In that case, they struck down appointments made by the service clubs of Greenville to the Public Auditorium Commission created by the Act, which had been attacked in the *Ashmore* case, but still later, the Court upheld a statute, which provided that two members of the State Board of Bank Control should be appointed upon the recommendation of the State Bankers Association, on the ground that there, the unofficial bodies did have a rational relation to the law to be administered. In this case, the Court applied the principle of its holding relating to the State Board of Bank Control and sustained the legislation. It should be noted that the second exception taken by the appealing defendant was held too vague and general to be worthy of consideration. This points up the necessity of the appealing lawyer citing both chapter and verse in any attack upon the constitutionality of any Act.

Supreme Court's Power to Grant Bail

In *State v. Whitener*,[18] a majority of the Court held that the Legislature is without power to enact a statute denying bail after conviction. The Court first noted that a section of the 1942 Code[19] had been omitted from the 1952 Code without legislative authority. From this circumstance, the majority doubted that it had been the legislative intention to disturb the statutory law from that which it had been prior to the adoption of the 1952 Code. Nevertheless, it met the constitutional question squarely, stating:

> The legislature has, however, adopted the Code as a whole in its present form. But even so, the legislature has no power to take away powers specifically granted to this Court by the Constitution. One of these powers is the historic writ of *habeas corpus*. Such a writ can be addressed to this Court in its original jurisdiction only under unusual circumstances, but appellant has presented to the Court such an occasion.

17. 211 S.C. 77, 44 S.E. 2d 88 (1947).
18. 81 S.E. 2d 784 (S.C. 1954).
19. S. C. CODE § 1032 (1942).

> This Court has the power to issue these writs and orders referred to in the Constitution. Those fundamental remedies and safeguards upon which each individual in our society has the right to rely must be preserved by the courts. Otherwise, these procedural rights embodied in our Constitution to insure the individual against oppression will become nullities.
>
> This Court, the judicial body of last resort in our state system of jurisprudence, has the inherent power to set bond in any case. Every defendant sentenced to ten years or less has the right to bail pending appeal. This Court can grant bail, in its discretion, where the sentence exceeds ten years.

The majority opinion is not fortified by decisions of other courts, and as the provision in the South Carolina Constitution relating to the separation of powers is substantially similar to those of other states, this absence of authority weakens the holding.

The strong dissent cites numerous authorities to support the view that the statute was constitutional. The dissenters said:

> It is, of course, not illogical to restrict or deny the right to bail pending appeal from conviction. Before conviction, one charged with crime is clothed with a presumption of innocence; after conviction, the presumption of innocence is overthrown by verdict and judgment of guilt, upon which there arises a legal, as well as laical, presumption that the conviction is just, which presumption is not destroyed or abrogated by appeal. *Parker v. State Highway Department*, S. C., 78 S. E. 2d 382. In accord with this concept, our Constitution of 1895, art. I, sec. 20, requires the admittance to bail before conviction, with an exception which is not irrelevant; but contains no provision with respect to bail after conviction of crime. It thus seems clear that there is no constitutional right which the above statute violates.

This opinion also takes issue with the statement in the majority opinion that a Section of the 1942 Code had been omitted from the 1952 Code without authorization. This opinion concludes that a 1944 statute had repealed the particular provision of the 1942 Code discussed in the majority opinion.

The question of statutory intent is relatively unimportant, but the constitutional question is extremely interesting. The rights of the individual improperly convicted would undoubtedly suffer if such individual is incarcerated while waiting for the Appellate Court to correct some heinous error resulting in his conviction. On the other hand, the rights of society might be seriously jeopardized, to say the least, if convicted murderers are permitted to be at large pending the appeal from their conviction.

The dissenting view appeals to the writer of this review.

Statutory Discrimination in Favor of Women Candidates

The pertinent portion of the Act,[20] which is the cause of the interesting question appearing in *Lee v. Clark*,[21] is the provision that:

> Not less than three of said consolidated school district trustees . . . shall be women electors. In the election of said trustees . . . the three women candidates . . . receiving the largest number of votes cast for the women candidates, shall be declared duly elected. . . .

The Act provided that as to the other six trustees to be elected, those receiving the highest number of votes, whether men or women, should be declared elected. The suit sought a declaratory judgment to determine the validity of the act, and it was contended that the provision above noted constituted an arbitrary and unreasonable discrimination against the male sex, rendering the Act violative of the equal protection provisions in the State and Federal Constitutions. The Court takes note of the line of cases which uphold acts providing that certain boards must contain members from opposite political parties, but it did not consider that such cases were dispositive of the question before the Court.

The Court said:

> Assuming the correctness of the principles enunciated in the line of cases mentioned relating to proportionate representation on boards or commissions, they do not control the question before us. The purpose of the challenged Act is not simply to obtain the composite judgment of men and women with respect to school problems. *There is no*

20. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 21-1901.1.
21. 224 S.C. 138, 77 S.E. 2d 485 (1953).

limitation on the number of women who may be elected. As to six places on the board, men and women compete on an equal footing, thus making it possible to have a board composed of all women. Whether an act could be sustained which merely provides for a board of trustees or other public body consisting of a fixed number of each sex need not now be decided. This important and far-reaching question we leave open. The Act here goes much farther than requiring that a certain proportion of the board shall be women. It gives them a preferential status at the polls. The precise question presented is whether in respect to the required votes for election, there may be a distinction. We think not. If by reason of their sex, women are, as argued by appellants, more intimately acquainted with the operation of the public schools and have a closer relation with the teachers and administrative problems, these are considerations which the voter may take into account in casting his ballot, but afford no justification for discrimination against male candidates for school trustee.

Due Process of Law

Several questions were raised and disposed of in *State v. Waitus*,[22] an unpleasant capital offense case, but the interesting one, from a standpoint of constitutional law, is that which led our Court to reverse a first degree murder conviction of the negro defendant, upon the ground that the members of his race had been systematically excluded from both the grand jury of Georgetown County, which had indicted him, and from the petit jury of Marion County, which had tried and convicted him.

Justice Oxner's opinion carefully reviews statutory and constitutional provisions of the South Carolina law relating to the composition and qualifications of juries. It then reviews the several holdings of the United States Supreme Court on the constitutional question, noting that the United States Supreme Court was the final arbiter in this field and that the state court was bound by its holdings notwithstanding that its own views might not be in accord therewith. The Court discusses the factual situation relating to the exclusion of negroes from juries in both Marion and Georgetown Counties, and concludes

22. 224 S.C. 12, 77 S.E. 2d 256 (1953).

that the record establishes that they had, in fact, been systematically excluded. It noted that the United States Supreme Court had reached the conclusion that due process was denied a negro indicted and tried and convicted under these circumstances. The Federal decisions on the question are collected and discussed, for which reason the opinion here serves as an admirable digest of these holdings.

State Police Power in Interstate Commerce

To one familiar with the crossing involved and the number of persons killed in crossing accidents at this place, one marvels at the attitude of the railroad company in appealing from the highly sensible order of the Commission requiring that the railroad either station a flagman or an automatic flashing signal at the Liberty Hill Crossing in Charleston County. But that comment is beside the point. The point raised on appeal is that the action of the State burdened interstate commerce in unnecessary fashion. The Court upheld the Commission's order on the ground that the exercise by the State of its police power was in all respects justified in order that the public be safeguarded against a danger.

The only puzzling thing in the subject case, *Atlantic Coast Line Railroad Co. v. Public Service Commission of S. C.*,[23] is the fact that the dispute was ever litigated. The principle of law that a State may exercise its police power in reasonable fashion, where interstate commerce is involved, is well recognized. Similarly, interstate commerce may not be burdened unnecessarily under the guise of an exercise of police power. However, when the average daily number of vehicles using the crossing on week days was 2,783, of which 263 used the crossing in a single hour, and 14 school buses used the crossing twice a day, it is hard to justify the railroad company's refusal to safeguard the crossing. The fact that 11 accidents with 7 fatalities occurred in a period of a few years was a further factor not overlooked by the Court.

23. 81 S.E. 2d 357 (S.C. 1954).